

1 **A3:** Chart with 2008 flow measurements taken with multiple flumes located on the creek.
2 (Applicable to Permit Application No. 30004087)

3
4 **GENERAL APPLICATION DETAILS**

5 The source of water identified in the Application and other documents is East Fork Spring
6 Creek. A review of the USGS quad map shows the source is an unnamed tributary of the
7 East Fork Spring Creek. The USGS quad is the preferred map in ARM, 36.12.114,
8 SOURCE NAME STANDARDS; therefore the source will be referred to as UT, East Fork
9 Spring Creek.

10
11 The Applicant is requesting a flow rate of 6.09 GPM and a volume of 9.8 AF per year. The
12 flow rate of 6.09 GPM will produce 9.8 AF if it flows 24 hours/day for 365 days.

13
14 The purpose of this application is to obtain a water right for 2 reservoirs that were built on a
15 UT of East Fork of Spring Creek in 1963 and 1973, but were not claimed during the
16 adjudication filing period. The reservoirs are to appropriate water for stock use and fish.
17 Reservoir #1, the most upstream reservoir has a capacity of 1 AF and reservoir #2, located
18 downstream of #1 has a capacity of 8.8 AF.

19
20 Parshall flumes, one with an 18" throat is located below reservoir #1 and another with a 12"
21 throat is located downstream of reservoir #2, were measured from in 2003 through 2008.
22 The records show the flow rate of water increases between the 2 flumes.

23
24 The Applicant proved the Possessory Interest criteria as found in the Statement of Opinion.
25 The Applicant was not required to prove Water Quality, because no valid objections were
26 received to Water Quality.

27
28 The SOP reflects that the Applicant did not prove the Physical Availability, Legal Availability,
29 Adverse Effect, Adequacy of Appropriation Works, and Beneficial Use permit criteria. These
30 criteria were considered in the hearing held October 29, 2009, and the post-hearing
31 submissions.

1 The following documents were received by December 17, 2009, the date on which the
2 record was closed:

- 3 • DFWP letter dated November 23, 2009 and signed by Scott Opitz, Livingston
4 Fisheries Management Biologist.
- 5 • Affidavit of Jamie A. Lannen signed by Jamie A. Lannen and dated November 30,
6 2009.
- 7 • Motion for Extension of Deadline to File Supporting Documentation dated December
8 3, 2009. The motion was signed by Marjorie Black, attorney for Applicant.
- 9 • Field Report from Keith Kerbel, Billings Regional Office Manager, dated December
10 15, 2009.
- 11 • Affidavit of Charles James Henderson signed by Charles J. Henderson and dated
12 December 17, 2009.
- 13 • Email from Jamie Lannen dated December 21, 2010 with subject stated as “stocking
14 rate and waterer questions”. Email states, “For the past forty years we have been
15 able to run around 120 aums on the property with the help of leasing of summer
16 pasture.”

17
18 Based on the evidence presented at the Show Cause Hearing and the close of the records,
19 the following findings and conclusions of law are rendered.

20
21 **Statement of Opinion Finding-Physical Availability**

22 *The Applicant is requesting to divert water year-round. Applicant did not provide water*
23 *measurement throughout the period of diversion of January 1 through December 31.*
24 *Applicant provided water measurements from February through July.*

25
26 **APPLICANT ARGUMENT**

27 UT of East Fork Spring Creek is a spring fed stream that originates on the Applicant's
28 property. It maintains year round flows but the water flow varies from month to month. This
29 variation is due to irrigation and the ground freezing during the winter months, November
30 through April. During the winter months, the flows are reduced but ample for stock and
31 maintenance of pond water levels. During the irrigation season the water in Spring Creek
32 increases due to irrigation run off and seepage from a large canal located within 150 feet of

1 the main spring.

2
3 The Applicant provided 2008 measurements from 1/10/2008 through 12/20/2008.

4

DATE	Upper flume 18" throat CFS	Lower flume 12" throat CFS	Flow increase CFS
1/10/08	.34	.79	.45
2/21/08	.36	.86	.50
3/14/08	1.2	1.66	.46
4/5/08	.60	1.5	.55
5/16/08	.90	1.54	.64
6/20/08	.98	2.7	1.72
7/12/08	.88	2.82	1.94
8/14/08	.65	1.58	.93
9/17/08	.70	1.4	.70
10/2/08	.72	1.37	.65
11/15/08	.43	1.0	.57
12/20/08	.40	.74	.34

5
6 **FINDINGS OF FACT**

7 1. The 2008 records include measurements for the year round period of diversion. The
8 measurements show an increase in flow rate from the upper flume to the lower flume.

9 2. The lowest measured flow during 2008 is .34 CFS (152.59 GPM) in January. The
10 Applicant's request is for 6.09 GPM.

11 3. The Applicant has provided evidence that water is physically available in the amount the
12 Applicant seeks to appropriate during the entire requested period of appropriation.

13 4. An Applicant must prove that there is water physically available in the source of supply
14 at the proposed point of diversion in the amount and during the time period that the
15 Applicant seeks to appropriate. E.g., *In the Matter of Application for Beneficial Water use*
16 *Permit No. 40C-92024 by Erika and Keith Nelson (1995).*

17
18 **CONCLUSIONS OF LAW:** Applicant has proven by a preponderance of the evidence that
19 water is physically available at the proposed point of diversion in the amount Applicant
20 seeks to appropriate, Mont. Code Ann. § 85-2-311(1)(a)(i).

1 **Statement of Opinion Finding-Legal Availability**

2 *The Applicant did not identify existing downstream legal demands and did not provide a*
3 *comparison of the physical water availability to the existing downstream legal demands.*

4
5 **APPLICANT ARGUMENT**

6 The Applicant identified two existing legal demands downstream on East Fork Spring Creek.
7 Both belong to Warren and Jamie Latvala.

8 (a.) 43A-18884 is a stock water right which Applicant identified as a right for instream
9 flow. Applicant did not identify the priority date or period of diversion for the water right.

10 (b.) 43A-191054 is an irrigation right with a priority date of 4/15/1885 and is for 1.88
11 CFS from March 1 – July 4. Applicant determined East Fork Spring Creek averaged
12 2.04 cfs between March 1 – July 4 which exceeds this senior water right.

13
14 Applicant's diversion is approximately 3.5 mile upstream from the Latvala's stock and
15 irrigation points of diversion on East Fork Spring Creek.

16
17 East Fork Spring Creek has numerous springs downstream from the Applicant's lower
18 reservoir which add additional water flow to the creek.

19
20 **FINDINGS OF FACT**

21 1. The Applicant identified 2 water rights located downstream of the Applicant's point of
22 diversion located on East Fork Spring Creek, one stockwater and one irrigation right owned
23 by Latvala.

24 2. The Application file includes a November 2002 "Index by Source" which shows 2 other
25 irrigation water rights located downstream on East Fork Spring Creek, one owned by Queen
26 Ranches and another right owned by Latvala. Applicant did not address these rights. (43A-
27 191055 and 43A-110452)

28 3. The Application file includes a November 2002 "Index by Source" which shows 2 other
29 stock water rights located downstream on East Fork Spring Creek both owned by Montana,
30 State of Board of Land Commissioners. Applicant did not address these rights. (43A-
31 137636 and 43A-137630)

32 4. Applicant correlated Applicant's flow measurements taken from March 14, April 5, May

1 16, June 20, and July 12 to the period of appropriation of the existing water right (March 1
2 through July 4). Applicant determined the average flow rate between March 14 and July 12
3 to be 2.04 CFS. Existing water right is for 1.88 CFS. Applicant did not show that the flow
4 rate required each month by the existing right. Applicant's records for 2008 show 1.88 CFS
5 is not available in March, April, or May.

6 5. Applicant did not include all of the existing demands on East Fork Spring Creek and did
7 not correlate those rights to water physically available.

8
9 **CONCLUSIONS OF LAW:** Applicant provided incomplete and inadequate evidence
10 showing existing legal demands and did not prove that water is physically available in a
11 manner that can be compared with existing legal demands. Applicant did not identify all
12 existing legal demands. *E.g., In the Matter of Application for Beneficial Water Use Permit*
13 *No. 43D 10220900 by Sam McDowell (DNRC Final Order 2007)*

14
15 Applicant has an affirmative burden to meet the required criteria and prove that water is
16 legally available. A failure to meet that affirmative burden does not mean the criterion is met
17 for lack of contrary evidence. It is the Applicant's burden to produce the required evidence,
18 and not doing so constitutes a failure of proof. *In the Matter of Application to Change Water*
19 *Right No. 41H 1223599 by MGRR #1, LLC., DNRC Proposal for Decision, adopted by*
20 *DNRC Final Order (2005).*

21
22 The Applicant has not proven by a preponderance of the evidence that water is legally
23 available at the proposed point of diversion in the amount Applicant seeks to appropriate,
24 and in the amount requested. §§ 85-2-311(1)(a)(ii), MCA

25
26 **Statement of Opinion Finding-Adverse Effect**

27 *The Applicant's plan for the exercise of the permit did not demonstrate that the Applicant's*
28 *use of water would be controlled so that the water rights of a prior appropriator could be*
29 *satisfied.*

30
31 **APPLICANT ARGUMENT**

32 The reservoirs have been in place since 1963 (upper pond) and 1973 (lower pond) and

1 there has never been a call for water by a downstream user.

2
3 Applicant has installed 6 Henderson waterers. The animals will be able to drink from either
4 the 2 reservoirs or the waterers. This will help to reduce the amount of water the animals
5 consume from the UT of East Fork Spring Creek.

6
7 The ponds create a hydraulic head increasing the flow of water in East Fork Spring Creek.
8 Measurements show an increase in flow between the two Parshall flumes.

9
10 Applicant states that upper pond has a control structure to release water. The lower pond
11 does not have a control structure, but Applicant explains irrigation is an effective
12 management practice to augment stream flow.

13
14 Applicant has a diversion point on their irrigation canal about 150 feet above the source of
15 the stream. By opening this headgate, Applicant can divert irrigation water to the stream.
16 Applicant explains it would take an hour or two and water would be available downstream to
17 the senior water rights.

18
19 Applicant is willing to place regulatory device on the lower pond to enable the Applicant to
20 send water downstream to senior users if called upon.

21
22 **FINDINGS OF FACT**

- 23 1. The largest consumptive use of East Fork Spring Creek water will occur when the
24 reservoirs are empty and must be fully filled and in that same year, the total evaporation in
25 the 2 reservoirs must be replaced.
- 26 2. Reservoirs are beneficial because they seep water and often times help to make an
27 intermittent stream flow continuously.
- 28 3. It is unknown how the Applicant would manage the control structure to release water in
29 the upper reservoir.
- 30 4. The Applicant explains that he would add irrigation water to the source to satisfy a call
31 by a senior water right, however the Applicant has not provided a mitigation plan to change
32 an irrigation water right to a stock and fish pond water right. The purpose of a water right

1 cannot be changed without authorization.

2 5. The Applicant did not provide a plan explaining how the Applicant would release water to
3 senior water rights if the inflow to the reservoirs becomes less than the consumptive losses
4 at the reservoirs.

5
6 **CONCLUSIONS OF LAW:** The Applicant bears the affirmative burden of demonstrating the
7 applicable criteria, Mont. Code Ann. §85-2-311(1) are met, including the criterion that prior
8 appropriators under an existing water right, a certificate, a permit, or a state water
9 reservation will not be adversely affected. E.g., *In the Matter of Application for Beneficial*
10 *Water Use Permit No. 25170-g41B by East Bench Grain & Machinery, Inc., DNRC (1983).*
11 Pursuant to Mont. Code Ann. §85-2-311(1)(b), adverse effect must be determined based on
12 a consideration of an Applicant's plan for the exercise of the permit that demonstrates that
13 the Applicant's use of the water will be controlled so the water right of a prior appropriator
14 will be satisfied. Montana Power Co. v. Carey (1984), 211 Mont. 91, 98, 685 P.2d 336,
15 340 (the Water Use Act was designed to protect senior water rights holders from
16 encroachment by junior appropriators adversely affecting those senior rights).

17
18 The Applicant has not provided a plan that proves the Applicant's use of water will be
19 controlled so the water right of a prior appropriator will be satisfied.

20
21 The Applicant has not proven by a preponderance that the water rights of a prior
22 appropriator under an existing water right, a certificate, permit, or a state water reservation
23 will not be adversely affected. Mont. Code Ann. § 85-2-311(1)(b).

24
25 **Statement of Opinion Finding-Adequacy of Diversion**

26 *The dams are of earthen construction and have culvert overflow structures to by-pass flows*
27 *but no regulated outlet works to release water.*

28
29 **APPLICANT ARGUMENT**

30 The reservoirs have been in place since 1963 (upper pond) and 1973 (lower pond).

31
32 The Applicant is willing to place a regulatory device on the lower pond to regulate the pond

1 and to comply with a call by a senior user.

2
3 **FINDINGS OF FACT**

4 1. The reservoirs have been in place for over 30 years, have collected water, and have not
5 failed.

6 2. The Applicant did not provide what regulatory device the Applicant would install nor
7 explain how the device would be adequate to comply with a call by an existing water user.

8
9 **CONCLUSIONS OF LAW:** Prior use of diversion works is admissible if relevant to
10 ascertain ability of works to adequately function, whether such prior use was "illegal" or not.
11 *In the Matter of Application for Beneficial Water Use Permit No. 75685-76H by Gray/Rhea-*
12 *Gray (DNRC Final Order 1991)*

13
14 An Applicant must determine what means of diversion, construction, and operation will
15 achieve the results the Applicant is attempting to achieve. *In the Matter of Application for*
16 *Beneficial Water Use Permit No. 60073-76L by M. G. Moss (DNRC Final Order 1988)*

17
18 The Applicant has not proven that the proposed means of diversion, construction, and
19 operation of the appropriation works are adequate. Since they have no regulated outlook
20 works to release water the diversion for the ponds are not adequate. Mont. Code Ann. § 85-
21 2-311(1)(c).

22
23 **Statement of Opinion Finding-Beneficial Use**

24 *Applicant indicated that "there is a minimal amount of water loss because the ponds are built*
25 *in stream." The application must account for all losses of water. There is no indication in the*
26 *application of the amount of evaporation that will occur or if the amount requested includes*
27 *that factor. Applicant did not provide any information showing the amounts requested for*
28 *flow through the reservoirs are necessary for the purposes of stock or a fishery. The flow*
29 *rate is strictly a back calculation of the volume of water impounded by the reservoirs if filled*
30 *at a constant rate over the period of a year.*

31
32 *Applicant did not provide any discussion or make any reference to the requirements and*

1 *how they met the needs for the proposed fishery. There was no discussion on profession*
2 *standards to ensure fish production and survival. Further there was no discussion on the*
3 *dynamics and design of the ponds that would allow for proper fish habitat including depth*
4 *and shade for temperature, water circulation for oxygenation of water and protection of fish*
5 *from moving out of the ponds into a less desirable environment.*

7 **APPLICANT ARGUMENT**

8 Applicant has improved methods of animal management, rangeland management and the
9 water movement through the area.

10
11 Both ponds have good fish habitat qualities due to depth and an abundance of aquatic
12 plants and animals, including fresh water shrimp.

13
14 Letter dated November 23, 2009, signed by Scott Opitz of the Montana Fish, Wildlife &
15 Parks, states that in his professional judgment both of the waters may contain brown trout,
16 Yellowstone cutthroat trout, and mountain whitefish. The current configuration of the ponds
17 appears to be adequate to support any fisheries that may currently exist. The ponds may
18 even be providing over wintering habitat for fish given their depth and size.

19
20 Over 6 pair of mallards and wood ducks nest on the ponds in the summer and at least 10
21 pair of Canadian geese nest on the ponds each summer. The ponds also provide open
22 water for geese and ducks in the winter months.

23 24 **FINDINGS OF FACT**

- 25 1. The Applicant has installed water gaps for the livestock to drink from the reservoirs.
26 Water gaps help to promote distribution of livestock and discourage livestock from residing
27 at the water source.
- 28 2. Increasing the efficiency of a water distribution system for livestock is beneficial to the
29 Applicant.
- 30 3. Applicant has not provided sufficient evidence that the proposed rate and volume of
31 water requested for the fishery is the amount necessary to sustain the intended purpose.
32 Applicant did not provide information to explain how many fish require this amount of water.

1 It is unknown how many fish the ponds are intended to support nor how much water is
2 necessary for the proposed fishery purpose.

3 4. Applicant has observed waterfowl nesting and using the reservoirs, but did not offer
4 other evidence that the requested amount of water is the amount necessary for wildlife use.
5 Applicant submitted no evidence that Applicant has any control over any wildlife that may
6 use the pond or that the pond is intended to serve any defined population of wildlife.

7
8 **CONCLUSIONS OF LAW:** Under §85-2-311(1)(d), MCA, an Applicant must prove by a
9 preponderance of the evidence the proposed use is a beneficial use. An appropriator may
10 appropriate water only for a beneficial use. See also, §§85-2-301 and 402(2)(c), MCA. It is
11 a fundamental premise of Montana water law that beneficial use is the basis, measure, and
12 limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396.

13
14 Appropriations are measured “at the headgate,” i.e., in the Lannen application, the surface
15 area of the reservoirs. *Wheat v Cameron*, 64 Mont. 494, 210 P. 761 (1922), which is to say
16 that seepage and evaporative losses are charged against the appropriative limit. In the
17 Matter of Application for Beneficial Water Use Permit No. 26751-40A by Reuben Pitsch
18 (DNRC Final Order 1985).

19
20 The Applicant has not proven the proposed fish and wildlife use of water is a beneficial use
21 of water for which Applicant can establish a water right under a permit because the
22 Applicant provided no evidence of a defined population of fish or wildlife which this water is
23 intended to support. The Applicant has not provided evidence to establish a direct
24 correlation between the amount of water applied for and the need for that amount of water to
25 sustain a defined fishery or wildlife population. The Applicant has not proven by a
26 preponderance of evidence that the quantity of the water proposed to be used is the amount
27 necessary for the proposed beneficial use. See In The Matter of Bitterroot River Protective
28 Association v Kenneth R. and Judith A. Siebel and the Montana Department of Natural
29 Resources and Conservation, Cause No. BDV-2002-519, Order On Petition For Judicial
30 Review, Montana First Judicial District Court (2003); Bitterroot River Protective Ass'n. v.
31 Siebel, 2005 MT 60, 326 Mont. 241, 108 P.3d 518.

1 The Applicant did not prove by a preponderance of the evidence their use of water for stock
2 and a fishery would be a beneficial use. Evidence must be presented to show the amount of
3 water is necessary for beneficial use. In the Matter of Application for Beneficial Water Use
4 Permit No. 41S-105823 by French (DNRC Final Order 2000).

5
6 The Applicant has proven by a preponderance of the evidence that stock water is a
7 beneficial use.

8
9 The Applicant has not proven by a preponderance of the evidence that the proposed fishery
10 use is a beneficial use of water nor that the amounts of water applied for are the amounts
11 needed to sustain the fishery. Mont. Code Ann. § 85-2-311(1)(d).

12
13 The Applicant at the show cause hearing on October 29, 2009 through additional evidence
14 and argument has not adequately shown why the Application should not be denied under
15 the terms specified in the Statement of Opinion issued by the Department August 10, 2009.

16 17 **FINAL ORDER**

18 Therefore, Application for Beneficial Water Use Permit No. Permit Application No 43A-
19 30004087 by Jamie A Lannen is **DENIED** for the reasons specified in this Order and in the
20 Statement of Opinion.

21 22 **NOTICE**

23 A person who has exhausted administrative remedies available within the agency and who
24 is aggrieved by a final decision is entitled to judicial review under the Montana
25 Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial
26 review under this chapter must be filed in the appropriate district court within 30 days after
27 service of the final order. (Mont. Code Ann. § 2-4-702)

28
29 If a petition for judicial review is filed and a party to the proceeding elects to have a written
30 transcript prepared as part of the record of the administrative hearing for certification to the
31 reviewing district court, the requesting party must make arrangements for preparation and
32 payment of the written transcript. If no request for a written transcript is made, the

1 Department will transmit only a copy of the audio recording of the oral proceedings to the
2 district court.

3

4 Dated this 19th day of May, 2010 .

5

6

/Original signed by Terry Eccles/

7

Terry Eccles, Hearings Officer

8

Water Resources Division

9

Department of Natural Resources

10

and Conservation

11

PO Box 201601

12

Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the **FINAL ORDER** was served upon all parties listed below on this 19th day of May 2010, by first-class United States mail.

MARJORIE BLACK – ATTORNEY
PO BOX 684
BOZEMAN MT 59771-0684

/Original signed by Jamie Price/
Jamie Price, Hearings Assistant
Hearings Unit, 406-444-6615

PERMIT APPLICATION STATEMENT OF OPINION

Application No.: 30004087 43A by Jamie A. Lannen

Date: August 5, 2009

Final Decision Maker: Terry Eccles, Regional Manager

GRANT APPLICATION: The findings and conclusions show that the criteria have been met.

DENY APPLICATION: The findings and conclusions do not show that the criteria have been met.

MODIFY APPLICATION: The findings and conclusions show the criteria have been met, however application modifications are required.

The following criteria must be met by an applicant. Complete this form if no objections were received to an application or if the objections were settled.

Application Details:

Application is to appropriate water for stock use and fisheries via two existing on-stream reservoirs. The reservoirs are 1 af and 8.8 af in capacities. Source of water is the East Fork Spring Creek that source being on the applicant's property. The property is located in Park County, Clyde Park, Montana.

The reservoirs are claimed to have been used for stock water, fishery and waterfowl since before 1973 but water right claims were not filed during the adjudication change application has also been filed on these two reservoirs based on the claim that they are exempt water rights. Exempt water rights are a class of water right that existed prior to July 1, 1973 and did not have to be claimed during the filing period ending April 30 1982 and extended once to July 1, 1995 for the general water rights adjudication. Only stock watering and individual domestic uses based upon instream flow or ground water sources were exempt from the filing requirement of the adjudication. They could be voluntarily filed, however. § 85-2-222, MCA. Exempt rights not claimed in the adjudication can still be determined by courts to be valid water rights, although the process and the court to make that determination is not clear at this time

Although the file contains information about some type of filings made on these reservoirs in 1960s with the clerk and recorder in Park County, in this application the Applicant is simply trying to obtain a *new* water right permit for the water in the reservoirs.

The amount requested is for a new water right under this proposed permit is one fill of each pond over a year period at a rate of 6.09 gpm for a total of 9.8 af/year. The system involves 2 instream flow through impoundments on the head waters of the spring. Parshal Flumes will be used between the ponds to measure loss or gain. The proposed ponds are for stock water for 300 animal units for an estimated 5.1 ac/ft. The permit application is to fill the two reservoirs, the upper one stores 1.00 ac/ft and the capacity of the lower reservoir is 8.80 ac/ft for a total of 9.8 ac/ft/yr. The period of use is 1/1 to 12/31 and the beneficial use being stock, fish and water fowl.

As a matter of clarification the reservoirs described in this application are also the subject of application to change # 30004089 43A. The change, independent fro this permit application, claim exempt water rights in the ponds and proposes to change the place of use of an existing stock and domestic water right from develop springs (groundwater to seven stock tanks and two on-stream reservoirs (the two existing reservoirs described in the permit application). The accompanying change application, #30004089, further describes the volume.

Physical Availability: The applicant must prove that there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.

FINDINGS OF FACT: Applicant provided flow measurements recorded from Parshall flumes one located on the upper reservoir the other on the lower reservoir of Spring Creek. Measured flows vary between 0.34 cfs in early April to 2.43 cfs in late June of 2003. Measurements taken at sites above and below the reservoirs indicate that the creek gains in flow through this reach of approximately 1/4 mile. The table below indicates the increase in flow between the two locations.

DATE	Upper flume flow cfs	Lower flume flow cfs	Flow increase in cfs
2/18/2003	.23	0.77	.54
3/13/2003	.94	1.39	.45
4/6/2003	.44	.92	.48
4/21/2003	.50	.99	.49
5/8/2003	.94	1.48	.54
5/27/2003	.5	1.31	.81
6/1/2003	.85	2.22	1.37
6/20/2003	.63	2.43	1.8
7/21/2003	.36	1.66	1.3

The spring creek is fed from leakage from a canal that traverses the property less than ½ mile up gradient of the springs. Applicant further indicated that flows in the creek have been at least 0.50 cfs since the start of measurements but the application does not provide any actual water flow measurement information outside of the period provided in the table above. The application does not provide sufficient information to make a finding that water is physically available during the entire requested period of appropriation which is 1/1 to 12/31 of each year. The requested amount is for 9.8 ac/ft/yr, 6.08 gpm. There is no comparison of what the Applicant is seeking year round versus what is physically available year round. The application does not provide sufficient information to make a finding that water is physically available during the entire requested period of appropriation.

CONCLUSIONS OF LAW: The Applicant has **not** proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, Mont. Code Ann. § 85-2-311(1)(a)(i). An Applicant must prove that there is water physically available in the source of supply at the proposed point of diversion in the amount and during the time period that the Applicant seeks to appropriate. *E.g., In the Matter of Application for Beneficial Water use Permit No. 40C-92024 by Erika and Keith Nelson (1995); In the Matter of Application for Beneficial Water Use Permit No. 41G-63796 by Carl and Glenda Ohs (1995)*(water availability is clearly an essential part of applicants case.) It is the applicant's burden to produce the required evidence, and not doing so constitutes a failure of proof. *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., DNRC Proposal for Decision, adopted by DNRC Final Order (2005).*

Legal Availability: The applicant must prove water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department.

FINDINGS OF FACT: Legal availability has to be determined using an analysis involving identification of physical water availability, identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use, and analysis of the evidence on physical availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water. Application did not identify other water rights on the East Fork Spring Creek. Applicant has made statements that the reservoirs are flow-through in nature, the stream gains water as it flows down through the existing reservoirs and that there is water available. A search by source name for public noticing purposes identified two other water users on this source of which one user filed an objection and then withdrew pursuant to a private settlement agreement. The applicant provided flow measurement information for a portion of the requested period of appropriation that indicates the stream does gain in flow through the stretch where the reservoirs exist but did not correlate that to water use downstream and availability to other existing water users.

CONCLUSIONS OF LAW: The Applicant has **not** proven that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department, Mont. Code Ann. § 85-2-311(1)(a)(ii). Applicant has an affirmative burden to meet the required criteria and prove that water is legally available. A failure to meet that affirmative burden does not mean the criterion is met for lack of contrary evidence. It is the applicant's burden to produce the required evidence, and not doing so constitutes a failure of proof. *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., DNRC Proposal for Decision, adopted by DNRC Final Order (2005).* The Department can grant or deny a permit, or can condition it, § 85-2-310(1); § 85-2-312(1); see *Montana Power Co. v. Carey* (1984), 211 Mont. 91, 98, 685 P.2d 336, 340 (the record of the trial proceeding contains substantial, credible evidence that the water supply source in Cold Springs was inadequate to sustain the Monforton's proposed appropriation along with existing senior rights without the restrictions imposed by the DNRC). Applicant has **not** proven that water is legally available from the source of supply in regards to the surface water connection to the

source. Mont. Code Ann. § 85-2-311(1)(a)(ii).

Adverse Effect: The applicant must prove the water rights of a prior appropriation under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Adverse affect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of water will be controlled so the water rights of a prior appropriator will be satisfied.

FINDINGS OF FACT: Applicant stated that the reservoirs have existed since before 1973 so the water to fill the reservoirs was taken over 35 years ago and there would be no adverse effect from this application. The proposed appropriation is for a flow-through amount of 6.08 gpm, which over a year yields the volume of the reservoirs, 9.8 af total. The reservoirs have overflow devices constructed of culvert material which allow flow to pass the reservoirs after water reaches the level of the culverts but do not have regulated outlet structures to release water. This does not allow for drainage/release of any water if it is called for by a senior user. Should the inflow to the reservoirs become less than consumptive losses at the reservoirs then water cannot be released to make up any losses. Applicant has not submitted a plan for the exercise of the permit that demonstrates that the applicant's use of water will be controlled so the water rights of a prior appropriator will be satisfied.

CONCLUSIONS OF LAW: The applicant bears the affirmative burden of demonstrating the applicable criteria, Mont. Code Ann. §85-2-311(1) are met, including the criterion that prior appropriators under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. E.g., In the Matter of Application for Beneficial Water Use Permit No. 25170-g41B by East Bench Grain & Machinery, Inc., DNRC (1983). Pursuant to Mont. Code Ann. §85-2-311(1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. Montana Power Co. v. Carey (1984), 211 Mont. 91, 98, 685 P.2d 336, 340 (the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights).

The Applicant has **not** proven that the water rights of a prior appropriator under an existing water right, a certificate, permit, or a state water reservation will not be adversely affected. Mont. Code Ann. § 85-2-311(1)(b).

Adequacy Of Diversion: The applicant must prove the proposed means of diversion, construction, and operation of the appropriation works are adequate.

FINDINGS OF FACT: The dams and reservoirs were constructed in the late 1960s or early 1970s. The dams are of earthen construction and have culvert overflow structures to by-pass flows but no regulated outlet works to release water. They appeared to be in good operating condition during a site visit by the department with applicant and objector. The construction of the dams for the reservoirs is of the type commonly used by the NRCS during that period.

CONCLUSIONS OF LAW: The Applicant has not proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Since they have no regulated outlook works to release water the diversion for the ponds are not adequate. Mont. Code Ann. § 85-2-311(1)(c).

Beneficial Use: The applicant must prove the proposed use of water is a beneficial use and that the flow rate and volume are the amounts of water needed to sustain the proposed beneficial use.

FINDINGS OF FACT: The requested use of water is for stock water, fisheries, and waterfowl. The 1 af reservoir is for stock water and for stock water and fishery purpose in the 8.8 af reservoir. Both will support waterfowl. The consumptive amount of use from these reservoirs for the stock water use for 300 animal units is based upon historic stocking rates. This amount of historic stocking rates is within DNRC Administrative Rule standards (ARM 36.12.115). The amount was appropriately calculated based on the number of cattle to be using the watering system. The volume of use is based on 15 gallons/head/day and the flow rate of 15 gallons/minute is reasonable to supply the water to the tanks using 2 inch diameter pipe. The remainder of the flow of the existing right will continue from the springs into the reservoirs. The flow has been measured to be as much as 135 gpm but only 15 gpm is available under the existing right that is not diverted into the pipeline.

The amount of water requested in this permit application is only for 1 fill of each reservoir at a rate of 6.08 gpm. Applicant indicated that “there is a minimal amount of water loss because the ponds are built in stream.” The application must account for all losses of water. There is no indication in the application of the amount of evaporation that will occur or if the amount requested includes that factor. Applicant did not provide any information showing the amounts requested for flow through the reservoirs are necessary for the purposes of stock or a fishery. The flow rate is strictly a back calculation of the volume of water impounded by the reservoirs if filled at a constant rate over the period of a year.

Applicant did not provide any discussion or made any reference to the requirements and how they met the needs for the proposed fishery. There was no discussion on profession standards to ensure fish production and survival. Further there was no discussion on the dynamics and design of the ponds that would allow for proper fish habitat including depth and shade for temperature, water circulation for oxygenation of water and protection of fish from moving out of the ponds into a less desirable environment.

CONCLUSIONS OF LAW: The applicant did not produce evidence to prove by a preponderance of the evidence their use of water for stock and a fishery would be a beneficial use. It is not that the Department is asking for certainty or unanimity, it is assessing the evidence to determine whether a criterion is more probably true than not. State v. Scarborough, 2000 MT 301, 302 Mont. 350, 14 P.3d 1202 (“preponderance of the evidence” is such evidence that, when weighed against opposing evidence, establishes the elements of the defense as more probably true than not). In this case there was a failure of proof on the part of the applicant. Compare In the Matter of Application for Beneficial Water Use Permit No. 25170-g41B by DM Ranch (x41S 30027838), DNRC (2008).

The Applicant has not proven by a preponderance of the evidence the proposed use of water is a beneficial use and are the amounts of water needed to sustain the proposed beneficial uses for stock and a fishery. Mont. Code Ann. § 85-2-311(1)(d).

Possessory Interest: The applicant must prove the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

FINDINGS OF FACT: The applicant signed and had the affidavit on the application form notarized affirming the applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW: The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See also ARM, 36.12.1802

Water Quality Issues: The applicant must prove that the water quality criteria have been met only if a valid objection is filed. The water quality of a prior appropriator will not be adversely affected; the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301 (1); and the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

FINDINGS OF FACT: No objections relative to water quality were filed against this Application. There were no objections relative to water classification or to the ability of a discharge permit holder to satisfy effluent limitations of the permit holder.

Public Notice: The Application was properly noticed pursuant to Mont. Code Ann. §85-2-307.

Environmental Assessment: The Environmental Assessment prepared by the Department for this Application was reviewed and is included in the application file.